

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

June 27, 2008

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In the Matter of  
Stanley Poole Construction

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Docket No. WET-2008-047  
DEP File No. 28-1810  
Gloucester

**RECOMMENDED FINAL DECISION**

This matter is an appeal of a Superseding Order of Conditions (“SOC”) issued under the Wetlands Protection Act, M.G.L. c. 131, §40 (the “Act”) and 310 CMR 10.00 et seq. (the “Wetlands Regulations”) by the Northeast Regional Office of the Department of Environmental Protection (“MassDEP” or “the Department”). On May 23, 2008, the Office of Appeals and Dispute Resolution (“OADR”) of the Department received this appeal by a ten resident group, with an authorized representative of Stevan Goldin, (the “Petitioner”), concerning the SOC issued to Stanley Poole (the “Applicant”) for performance of certain work on a property located at 12 Rio Drive in Gloucester (“the Property”).

**I. Facts and Procedural Background**

On June 2, 2008, the Department filed a motion to dismiss this appeal on the grounds that the Petitioner has not demonstrated the required grounds for standing, namely, that Petitioner did



not demonstrate any prior participation in the proceedings in this matter. Petitioner failed to respond to this motion within the seven (7) business days required by the regulations governing this adjudicatory proceeding. See, 310 CMR 1.01(11)(a)(1) and 1.01(3)(c).

On May 28, 2008, OADR issued a Scheduling Order directing the parties to prepare for and attend a pre-screening conference (the “Conference”) for the purposes of: (1) determining if the appeal could be settled; (2) setting issues for hearing and (3) setting a schedule for pre-hearing proceedings to allow for fair and efficient preparation for hearing by the parties. The Scheduling Order directed the Petitioner to initiate settlement discussions with the other parties by a date certain. Petitioner failed to do so. The Scheduling Order also directed Petitioner to prepare a brief pre-screening memorandum to set forth the relief sought, the issues and any disputed facts. Petitioner failed to file this memorandum. The Scheduling Order also compelled the attendance of the Petitioner or its authorized representative at the Conference. Petitioner failed to attend or send a representative. All other parties fully complied with the Scheduling Order; all submitted memoranda, and attended the Conference.<sup>1</sup>

## **II. Dismissal is Warranted for Lack of Standing**

Under Section 10.05(7)(j)2.a, various listed persons may file a notice of claim to challenge the issuance of an SOC. This list of persons with standing to appeal no longer includes abutters to the property that is the subject of an SOC as a matter of right. The only category of persons with standing to appeal that appears to apply to the Petitioner here is the category of

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<sup>1</sup> The provisions of 310 CMR 10.05(7)(j) (effective October 31, 2007) govern appeals of SOC's such as the Petitioner's appeal in this case. The Petitioner requested transfer of this matter to the Division of Administrative Law Appeals in the notice of claim. There are no grounds for such a transfer, as Mr. Goldin has been repeatedly told in multiple rulings from OADR. See, e.g., *Matter of Cretarolo*, Docket No. WET-2007-002, Recommended Final Decision (January 18, 2008) adopted by Final Decision (January 23, 2008) and Final Decision on Reconsideration (February 8, 2008); *Matter of Dunfudgin, LLC*, Docket No. WET-2008-012, Recommended Final Decision (March 24, 2008) adopted by Final Decision (April 2008). Appeals under Section 10.05(7)(j) remain at OADR and will not be transferred to DALA as a matter of course. No reason has been produced in the notice of claim as to why this matter should be transferred.

“any ten residents of the city or town where the land is located.”<sup>2</sup> A ten resident group must show previous participation in permit proceedings that were the subject of the notice of claim. See, 310 CMR 10.05(7)(j)2.a and 310 CMR 10.05(7)2.b.iv. Previous participation is defined as “the submission of written information to the Conservation Commission prior to the close of the public hearing, requesting an action by the Department that would result in a Reviewable Decision, or providing written information to the Department prior to issuance of a Reviewable Decision.” See, 310 CMR 10.05(7)(j)2.a. Petitioners fail to allege any facts that show that even one of them participated in the prior proceedings to the degree necessary to establish standing to pursue a notice of claim for an adjudicatory hearing. No evidence of prior participation is discernable from review of the materials included with the notice of claim. The one written communication made to the Department was treated as a request for information, and Petitioners’ representative raised no objection to this that appears in the record.

Standing is jurisdictional and may be raised at any time by the Presiding Officer. *Matter of Gallagher Group*, Docket No. 2003-019, Recommended Final Decision (May 2, 2005). An appeal may be dismissed upon jurisdictional grounds where evidence fails to support claims of standing. *Matter of Stephen Miers*, Docket Nos. 2002-001, 2002-002, Recommended Final Decision (February 16, 2006). *Matter of Gallagher Group*, Docket No. 2003-019, Recommended Final Decision (May 2, 2005); See, *Higgins v. Dept. of Environmental Protection*, 64 Mass. App. Ct. 754; 835 N.E.2d 610; 2005 Mass. App. LEXIS 961 (October 13, 2005) (Demonstration of proof of compliance with Department’s regulatory requirements for standing in 310 CMR 9.00 et seq., nearly identical to those in 310 CMR 10.00 et seq. including prior participation requirement, recognized as prerequisite for right to adjudicatory hearing by Court of Appeals).

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<sup>2</sup> The other parties with standing to file a notice of claim challenging an SOC are: (1) the applicant; (2) a landowner (the owner of record of the land or an interest in the land that is the subject of the SOC); (3) the local conservation commission or (4) an aggrieved person if previously a participant in the permit proceedings.

In this case, Petitioner has failed to provide a complete notice of claim that included the basis for its prior participation and has failed to respond to the Department's motion with any evidence on this point. Therefore, I conclude that Petitioner does not have standing to claim a right to an adjudicatory hearing in this matter.

### **III. Dismissal is Warranted for Lack of Prosecution**

Under 310 CMR 1.01(10), which is applicable to this adjudicatory proceeding, a Presiding Officer is authorized to impose sanctions upon parties which have conducted themselves in the same manner as have Petitioners. Specifically:

(10) Sanctions. When a party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; demonstrates an intention not to proceed; demonstrates an intention to delay the proceeding or resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01; the Presiding Officer may impose appropriate sanctions on that party. Sanctions include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with 310 CMR 1.01(4);
- (d) striking pleadings in whole or in part;
- (e) dismissing the adjudicatory appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

In this case, the Petitioners have:

(1) failed to file their claim documents to state complete claims establishing standing;

(2) failed to respond to the Scheduling Order by:

- (a) failing to initiate settlement discussions as ordered;
- (b) failing to file a Pre-Screening Memorandum; and
- (c) failing to attend the Pre-Screening Conference; and

(3) have made clear by conduct and statements in filings that Petitioner had no intention of participating in the proceedings.

Petitioner decided not to attend the Pre-Screening Conference. Petitioner failed to notify OADR or the parties of that intent in a timely manner, resulting in all other parties having to incur the expense of counsel to attend, prepare for and participate in the Conference.

The ultimate sanction of dismissal is justified in this case from all of Petitioners conduct. The Pre-Screening Conference under the amended regulations at 310 CMR 10.05(7)(j) in this proceeding serves the same purpose as does the prehearing conference at DALA. The Pre-Screening Conference is the only meeting prior to hearing and its purpose of establishing issues and the order of proceedings is central to the preparation of the matter for hearing. As stated by Magistrate Rooney while recommending dismissal of a notice of claim for adjudicatory hearing for failure to attend a prehearing conference in *Matter of Robert W. McKenney*, DALA Docket No. DEP-06-549, DEP Docket No. 2006-042, 2007 DALA LEXIS 18, Recommended Final Decision (January 23, 2007):

The reason an unexplained failure to attend a prehearing conference has often led to dismissal can be explained by the central role such conferences play in the adjudicatory process. It is typically the only occasion on which the parties to an appeal at the Division of Administrative Law Appeals must meet before the hearing. At this conference, the issues to be adjudicated are decided, the witnesses identified, and a hearing schedule established.

As noted in the joint filing by the Department and the Conservation Commission, the Commissioner sanctioned a Petitioners' group, for which Mr. Goldin was the authorized representative, for similar conduct in *Matter of Cretarolo*, DEP Docket No. WET-2007-002 Recommended Final Decision (January 18, 2008), adopted by Final Decision (January 23, 2008) and also in *Matter of Dunfudgin, LLC*, Docket No. WET-2008-012, Recommended Final Decision (March 24, 2008) adopted by Final Decision (April 2008). Therefore, Mr. Goldin is on notice of the critical importance of participation in the Pre-Screening Conference and the mandatory nature of Petitioners' obligation to attend and participate.

Most unfortunately, Petitioner's failure to participate and prosecute their appeal obstructed any possibility for resolution of this matter. Petitioner's failure to provide complete information about their claims also resulted in prejudice to the Applicant, the Department and the Conservation Commission. These parties cannot properly defend themselves in this matter where the Petitioners refuse to clarify their issues or provide information about their witnesses or other evidence for hearing. The filing of a notice of claim, followed by a failure to prosecute, also resulted in Petitioners' imposition of unnecessary legal costs and burdens upon the other parties to this matter.

Therefore, for all the reasons set forth herein, I recommend that this matter be dismissed for lack of standing and lack of prosecution.

#### **NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the  
Department of Environmental Protection. A signed copy of this document  
is on file at the DEP office listed on the letterhead.

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Laurel A. Mackay  
Presiding Officer